No. 16177

In the United States Court of Appeals for the Ninth Circuit

LYNDOL L. YOUNG and MILDRED W. YOUNG,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

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CITATIONS

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Tax Court is not officially reported. (R. 74-78.)

JURISDICTION

The petition for review (R. 80-84) involves federal income taxes for the taxable year 1952. On March 9, 1955, the Commissioner of Internal Revenue mailed to the taxpayers a notice of deficiency in the amount of $7,705.78. (R. 9-12.) Within

ninety days thereafter and on May 19, 1955, the taxpayers [1] filed a petition with the Tax Court for a redetermination of the deficiency under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 3-15.) The decision of the Tax Court was entered on April 7, 1958. (R. 79.) The case is brought to this Court by a petition for review filed June 11, 1958. (R. 85.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the Tax Court correctly held that the taxpayer had failed to satisfy his burden of proving that he was entitled to business expense deductions under Section 23(a)(1)(A) of the 1939 Internal Revenue Code in excess of the amounts allowed by the Commissioner for the following items: business promotional expenses at taxpayer's residence; dues and expenses at various clubs; and business travel expenses.

2. Whether the Tax Court fulfilled the statutory requirement of Section 7459(b) of the 1954 Internal Revenue Code by rendering a memorandum opinion containing the facts presented by the case but not setting out the findings of fact as a separate category of the report.

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[1] Mildred W. Young is a petitioner in this case only by virtue of the fact that she filed a joint income tax return for the taxable year 1952 with her husband Lyndol L. Young; consequently, reference to taxpayer hereafter in this brief refers to the taxpayer husband, Lyndol L. Young.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [as amended by Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.* —

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

* * * *

(26 U.S.C. 1952 ed., Sec. 24.)

Internal Revenue Code of 1954:

SEC. 7459. REPORTS AND DECISIONS.

* * * *

(b) *Inclusion of Findings of Fact or Opinions in Report.*—It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions, and memorandum opinions.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7459.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

Sec. 39.23 (a)-2 *Traveling expenses.* (a) Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses.

* * * *

Sec. 39.24 (a)-1 *Personal and family expenses.* * * * In the case of a professional man who rents a property for residential purposes, but incidentally receives clients, patients, or callers

there in connection with his professional work (his place of business being elsewhere), no part of the rent is deductible as a business expense. If, however, he uses part of the house for his office, such portion of the rent as is properly attributable to such office is deductible.

* * * *

STATEMENT

The facts as found by the Tax Court are contained within the memorandum opinion rendered by that court. (R. 74-78.) The facts, based on the evidence introduced at the trial which consisted entirely of the taxpayer's testimony (R. 75), may be summarized as follows:

The taxpayer, a lawyer, and his wife filed their joint income tax return for the taxable year 1952 with the District Director of Internal Revenue, Los Angeles, California. In his return filed for the taxable year 1952, the taxpayer claimed business deductions for promotional expenses connected with his personal residence, club dues and expenses and travel expenses in the amounts of $9,493.62, $2,154 and $3,500 respectively. The Commissioner disallowed a portion of the amount of the expenses on each of the respective items as claimed by the taxpayer. Consequently, the Commissioner determined a deficiency in the taxpayer's income tax for the calendar year 1952 in the amount of $7,705.78. The court, upon considering the testimony pertaining to each item with respect to which expenses were in controversy, decided that in all instances the taxpayer had completely

failed to meet his burden of proving that his actual expenses were greater than the amounts the Commissioner had allowed. (R. 74-75.) From this decision, the taxpayer has appealed to this Court.[2]

The taxpayer's personal residence was located at 138 North June Street, Los Angeles, California. In his 1952 tax return, the taxpayer claimed as a business expense $9,493.62 of the expenditures incurred in the operation of his personal residence. Specifically, the amount claimed was an allocation of a portion of the total household expense incured in that year. The amount claimed was composed of expenditures for servants, groceries, utilities, yard expenses and other similar items. Although the taxpayer maintained a downtown law office, he testified that some of his clients came to his home during the taxable year. Accordingly, the Commissioner allowed $750 of the claimed amount of the household expense as a business deduction. The taxpayer stated that in the taxable year 1952 his gross income from his legal practice alone was $61,000 and that in prior years an amount similar to his 1952 claimed deduc-

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[2] In the court below, the taxpayer claimed a deduction for depreciation that was $3,000 in excess of what the Commissioner had allowed. The disputed amount represented depreciation on taxpayer's automobile of $1,000 per year for the three tax years prior to 1952. The taxpayer had neglected to take this amount as a deduction on his returns for those years. The Tax Court held that the taxpayer could not take the claimed deduction of $3,000 in the taxable year 1952 since he should have taken it in the years the depreciation actually took place. (R. 78.) Apparently, the taxpayer does not now press this claim. (Br. 6-10.)

tion had been allowed as a business expense on account of his household operations expense incurred in his legal practice. The only evidence the taxpayer introduced below was his general statement that he carried on a substantial portion of his legal practice in his home. He totally failed to show what portion of his total home expenditures were related to his legal practice. The Tax Court held that the Commissioner had correctly disallowed the amount in controversy and that the taxpayer had failed to satisfy his burden of showing he was entitled to a greater amount of business expense in operating his residence than the amount allowed him by the Commissioner. (R. 76.)

In 1952 the taxpayer belonged to the Los Angeles Country Club, the Stock Exchange Club in downtown Los Angeles, and the Beach Club in Santa Monica. On his 1952 income tax return, the taxpayer claimed $2,154 as a business deduction on account of club dues and expenses. The Commissioner disallowed $1,146 of that amount thereby allowing the taxpayer a deduction for the business expenses related to his club memberships in the amount of $1,008. The Beach Club was not sued for business purposes according to the evidence introduced at the trial below. The taxpayer testified that a few business conferences took place at the Los Angeles Country Club and the Stock Exchange Club; however, he failed to maintain records of either the business conferences or the business expenditures incurred at the clubs. The taxpayer stated that he and his wife frequently dined at the clubs, generally every Sunday, and that

to a certain extent the clubs were used by both of them for social and personal purposes. The Tax Court typified the taxpayer's testimony as "meager" and "unsatisfactory" and held that the Commissioner correctly disallowed the alleged club expenses in the amount of $1,146. (R. 75-76.)

The taxpayer claimed a business deduction of $3,500 in connection with his travel expenses for the taxable year 1952. Of this amount, the Commissioner allowed $2,158.62. At trial the evidence introduced amounted merely to the taxpayer's statements that he spent the claimed sums on business trips. He stated that he made a trip to Boston to confer with a client; however, on this trip his wife accompanied him and they visited their daughter in Newport, Rhode Island. The taxpayer and his wife also visited Hawaii where they stayed for three weeks in a $60 a day hotel room. In this regard, the taxpayer stated that "part of the trip was to conduct an inquiry with reference to the wife of a client of mine who was then in Honolulu at the Royal Hawaiian Hotel, which inquiry was conducted". The taxpayer claimed $1,500 of the expenses connected with this trip as business travel expenses. Although the Commissioner admitted below that a trip such as this to Hawaii would cost $1,500, the taxpayer had failed to prove that the trip itself was for business purposes. The remainder of the testimony presented as to the claimed travel expenses was merely the taxpayer's general statement that the balance of his travel expense was connected with "local matters, going to Arizona in 1952 * * * La Jolla, San Diego, and trips

in connection with these insurance company cases where bad accidents occured, down at Palm Springs." The Tax Court held that the "vague" and "inconclusive" testimony of the taxpayer would hardly support the allowance granted by the Commissioner. Accordingly, the lower court sustained the Commissioner's disallowance in the amount of $1,341.38 of the taxpayer's claimed business deduction for travel expenses. (R. 77-78.)

SUMMARY OF ARGUMENT

The taxpayer contends that he is entitled to larger business expense deductions for his household operations relating to his legal practice, his club affiliation expenses, and the expenses incurred in his travels than the amounts allowed him by the Commissioner. The evidence introduced by the taxpayer consisted entirely of his own testimony which was not concerned in any way with showing what expenses he incurred in the taxable year 1952 that related to his legal practice nor did he make any attempt towards establishing the actual amounts of the alleged expenses in that taxable year. The taxpayer in effect substituted his required burden of proving the amount of his actual expenses by merely testifying that he had business clients who conferred with him at his home and clubs, that he made trips for business purposes, that he received specific fees from certain clients, and that he incurred expenses in receipt of this income. Apparently it is the taxpayer's position that he is entitled to deductions in the amount he claims because he feels they are reasonable in comparison with his in-

come for 1952 and further he had taken deductions in approximately the same amounts in prior years.

The Tax Court found the taxpayer's testimony to be exceedingly unsatisfactory and fully deficient for substantiating the deductions for the expenses he claimed he incurred. The Tax Court was also very much unimpressed by the taxpayer's attempt to substantiate a deduction in the amount he claimed in the taxable year 1952 by showing that he had taken deductions in approximately the same amount for a number of years prior to 1952. The Tax Court accordingly found for the Commissioner since the court below held that the taxpayer had completely failed to satisfy his burden of establishing his case. The record fully supports the Tax Court decision and certainly warrants affirmance by this Court. The taxpayer has failed to present any matters of substance in his present brief, and he has further failed to show that the Tax Court's decision was in any way clearly erroneous.

The taxpayer also objects to the fact that the Tax Court rendered a memorandum opinion which contained the facts of the case within the opinion itself rather than setting out the findings of fact in a separate category. This objection is without merit in that a Tax Court memorandum opinion that does not contain a separate category of findings of fact is certainly in conformity with the statutory authority; furthermore, perhaps in this case it is the most logical manner of stating the facts presented by each aspect of the proceeding. The memorandum opinion

certainly contained all the pertinent facts presented by this case and correctly decided each matter.

ARGUMENT

I

The Tax Court Correctly Held That the Taxpayer Failed To Introduce Evidence That Would Entitle Him To Larger Business Expense Deductions In Connection With His Personal Residence, Clubs, and Travel Than the Amounts Allowed Him By the Commissioner

The taxpayer is claiming that he incurred greater business expenses in operating his personal residence, maintaining his club affiliations, and in connection with his travels than the respective amounts allowed him by the Commissioner. (Br. 6-10.) The amounts of the deductions allowed the taxpayer by the Commissioner were in all instances specifically approved by the court below. In a proceeding such as this, it must be acknowledged that a presumption of correctness attaches to the Commissioner's determination and that the taxpayer has the burden of proving otherwise. *Helvering* v. *Nat. Grocery Co.*, 304 U. S. 282; *Helvering* v. *Taylor*, 293 U. S. 507; *Showell* v. *Commissioner*, 238 F. 2d 148 (C. A. 9th), rehearing denied, 238 F. 2d 155. When the evidence introduced by a taxpayer is less than satisfactory and/or uncorroborated, surely the trier of the facts has the best opportunity to determine whether the taxpayer's claim, or any part of it, should be denied. *Showell* v. *Commissioner*, *supra*, p. 152; *Baumgardner* v. *Commissioner*, 251 F. 2d 311 (C. A. 9th). The court

below noted that the only evidence presented before it was the testimony of the taxpayer, and the trial judge stated throughout the opinion that this testimony was "meager", "unsatisfactory", "vague", "inconclusive", and "insufficient". (R. 75, 77.) The Tax Court determined that there was no question but that the taxpayer had utterly failed to prove his case. Certainly, a case such as this presents only questions relating to factual matters, and this Court has often stated that the Tax Court's findings will not be disturbed unless a clear error appears. *Baumgardner* v. *Commissioner, supra; National Brass Works* v. *Commissioner*, 205 F. 2d 104 (C. A. 9th); *Cohn* v. *Commissioner*, 226 F. 2d 22 (C. A. 9th); *Ward* v. *Commissioner*, 224 F. 2d 547 (C. A. 9th). And, moreover, the burden of proving that there is a clear error in the Tax Court's determination is imposed on the party appealing the decision. *Wener* v. *Commissioner*, 242 F. 2d 938 (C. A. 9th).

We submit that the Tax Court's decision in the instant case is irrefutably correct as to every matter decided by it. The nature of the taxpayer's testimony and his total failure to prove his claims necessitated the Tax Court to deny any alleged amounts of business expenses in excess of the deductions allowed him by the Commissioner. We further submit that the taxpayer's present brief is thoroughly deficient in showing any error committed by the Tax Court. The taxpayer never introduced evidence upon which the Tax Court could have granted him deductions in excess of the amounts allowed him by the

Commissioner, nor were there any matters of substance as introduced by the taxpayer at trial that were not considered by the lower court. The facts presented in this case together with the taxpayer's failure to introduce the necessary evidence to support his alleged claims conclusively prove that the Tax Court opinion was correct in all respects.

An examination of the evidence introduced by the taxpayer regarding his claim for household business expenses in connection with his legal practice shows that his testimony is utterly void as to any specific amounts of business expenses of this type incurred by him in the taxable year under review. Apparently the taxpayer determined that he could establish his claimed business deduction for household expenses by showing that because he conducted part of his legal practice with certain clients in his home for a number of years and that since he had a large income from his legal practice the amount he claimed was reasonable and therefore should be allowed. (Br. 6-8; R. 48-50.) Furthermore, he also seems to be under the impression that since similar amounts were allowed in prior years the Commissioner was again bound to grant him amounts approximating the prior deductions in taxable year 1952. (Br. 9-10; R. 36.)

The taxpayer went into great detail in elaborately describing what type of legal practice he conducted, who his clients were, and the amount of fees he received. (R. 23-24.) However, he did not even attempt or possibly was unable to state what expenses he incurred in 1952 at his home that were in any way related to his legal practice; in fact, there is a serious

question as to whether the taxpayer incurred any household expenses at all in connection with his law practice in the taxable year 1952. (R. 49-50.) The taxpayer testified only that the total cost of operating his home was $20,000, and he allocated a "reasonable" amount as a business expense. (R. 48.) Specifically as to these expenses, his only additional testimony was directed towards the nature of the items composing the amounts which he claims would be business expenses. His testimony reads (R. 46-47):

> Q. (By Mr. Reardon): Now, directing your attention to the amounts claimed on the business promotional expense in 1952, and substantiating this claim you submitted cancelled checks to the agent?
>
> A. Yes.
>
> Q. And these include amounts for—now, correct me if I am mistaken: Butler, poultry, plumbing, cleaning, and laundry, groceries, miscellaneous household, water, power and gas, garden, vegetables, yard maintenance, electric maintenance, florist and milk.
>
> A. All those items are everything connected with the operation of the premises and the maintenance of living there.
>
> Q. Your home there on North June Street in the year 1952 was adjacent to the Wilshire Country Club?
>
> A. Yes.

Upon due consideration of this evidence as introduced by the taxpayer, it seems difficult to understand how any of his claims in this category were allowed. Nevertheless, the Commissioner did grant the

taxpayer a business deduction of $750 [3] for the expense of operating his home even though the taxpayer maintained a law office in downtown Los Angeles. In this connection the Commissioner had granted the taxpayer a deduction for all the expenses he claimed as business telephone calls in 1952 on his home telephone (the taxpayer did not segregate his business and personal calls on his home telephone). Moreover, there was no office equipment, not even a typewriter, in his home, and his secretary was never in his home in 1952. (R. 41-42, 48, 49.) Indeed it could be stated without reservation that the Commissioner was quite generous in granting the taxpayer a deduction in the amount that was allowed for 1952.

The taxpayer urges that his club expenses for the taxable year 1952 were actually $2,154 although the Commissioner allowed only $1,008 of that amount; consequently, he claims, the Tax Court committed error in sustaining the Commissioner's determination. (Br. 8-9.) Here again, the taxpayer's evidence was not directed towards proving the specific amount he claims but instead was only concerned

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[3] The taxpayer has specified as an error the Tax Court's statement that he was claiming $9,493.62 as a business expense of maintaining his residence whereas, he states, he was actually only claiming $5,843.62 as a business expense and the balance of $3,150 were "cash disbursements" made in connection with the maintenance of his law practice. (Br. 7.) However, the taxpayer's 1952 income tax return, his petition for redetermination of the deficiency as filed in the Tax Court, the opening statement of his counsel, and his own testimony leaves no doubt that the so-called "cash disbursements" expenses were for costs related to his personal residence. (R. 5-6, 19, 46-47, 52, 60.)

with his clients, who, at one time or another, had been at one of his clubs for business purposes. (R. 27-35.) It definitely appeared that very little, if any, business use was made of the taxpayer's club affiliations in 1952. (R. 42-46.) His testimony suggests that the taxpayer and his wife utilized the Beach Club for personal reasons only in 1952. (R. 44-46.) Although the taxpayer only testified as to these claims, he did state that he had records, bills, and statements substantiating the amounts spent at the clubs which he did not bring to the trial. (R. 42-43.) It seems almost inconceivable that an individual of taxpayer's qualifications would fail to introduce this most pertinent evidence if it did support his claim that the club expenses were in fact business expenses. Perhaps the substance of the taxpayer's position is best explained by the following statement in his present brief (p. 15):

> Certainly this sum of money [$2,154] is a modest business expense for the evidence conclusively showed that petitioner Lyndol L. Young received substantial fees from his clients which more than justifies the amount of club expense claimed in 1952.

The taxpayer is thus virtually admitting that he is unable to substantiate his claim for a club expense deduction in the amount he requests except on his own subjective basis as to what he feels is a reasonable expense in comparison with the income he earned in 1952. This, of course, is insufficient to justify the allowance he seeks.

The taxpayer offered very little evidence, again consisting entirely of his own testimony, substantiating his claim for travel expense in the amount of $3,500. (R. 37-38.) The Commissioner reduced this amount to $2,158.62 which was upheld by the Tax Court. (R. 77-78.) The taxpayer's testimony leaves no doubt that the Tax Court was correct in describing it as "vague" and "inconclusive". (R. 77.) In support of a claimed business trip to Honolulu, Hawaii, in which he was accompanied by his wife, both staying at the Royal Hawaiian Hotel in a $60 per day room for three weeks, the taxpayer's sole evidence introduced at trial was the following statement (R. 37):

> * * * part of the trip was to conduct an inquiry with reference to the wife of a client of mine who was then in Honolulu at the Royal Hawaiian Hotel, which inquiry was conducted.

The taxpayer claims that the Commissioner conceded that such a trip would cost $1,500. (Br. 16-17; R. 38.) Be that as it may, there is certainly no concession by the Commissioner nor proof by the taxpayer that this particular trip was in fact one of a business nature.

The taxpayer's testimony as to his other business trips is quite ambivalent. Although he states he made a business trip to Boston and New York, he acknowledges that his wife accompanied him and that they visited their daughter and son-in-law in Newport, Rhode Island. The taxpayer did not testify as to the nature of the expenses, their composition, or whether the Commissioner disallowed this specific claim; he

only stated that he allocated $1,000 of the expenses incurred in this trip as business expenses. He claims his other travel expenses were in connection with local matters such as "going to Arizona in 1952 * * * La Jolla, San Diego, and trips in connection with these insurance company cases where bad accidents occurred, down at Palm Springs". (R. 38.) Once again, the taxpayer's own statement is indicative of the method by which he determined his alleged business expenses pertaining to his travels. He stated, "I think that $3,500 out of the total expense of $7,-500.00 would be a fair division of the allocated business expense". (R. 38.) In other words, he was totally unable to introduce any evidence to substantiate this claim.

Apparently the taxpayer feels that the court below did not allow him the opportunity of presenting all the evidence he wished to introduce. (Br. 3, 22.) In fact, the taxpayer has set out in his brief a portion of the testimony during which the trial judge urged the taxpayer to refrain from presenting so many irrelevant details, but instead, present facts upon which the court could render a decision. Taxpayer has characterized this request from the bench as an "admonition from the Court" (Br. 3, 16), a description which is neither accurate nor justified. Nevertheless, the record does show that the taxpayer continued to present additional testimony that was very descriptive in detail but still quite deficient in showing how he was entitled to business deductions for the amounts he claimed.

As we previously mentioned, the taxpayer has urged throughout that since he filed returns for years prior to 1952 claiming the approximate amount of the deductions now in issue, he should accordingly be allowed the deductions in the amounts he claims for 1952. (Br. 9-10, 14-15, 18-19, 23-24.) Apparently taxpayer reasons that the Commissioner by accepting the returns for those years had in effect issued a ruling upon which the taxpayer has relied; therefore, the taxpayer contends the Commissioner is estopped from disallowing the amounts now in controversy. Suffice it to say, that the word ruling in regard to the administration of the internal revenue laws has a very specific and technical meaning which by no means has any relation to the factual situation concerning this particular aspect of the case at bar. But be that as it may, even erroneous rulings can be corrected by the Commissioner; the Commissioner is not estopped from correcting a mistake. *Automobile Club* v. *Commissioner*, 353 U. S. 180; *Landau* v. *Riddell*, 255 F. 2d 252 (C. A. 9th).

In the instant case the Tax Court recognized the factual situation as it actually exists and succinctly answered the taxpayer's argument. The lower court, citing *South Chester Tube Co.* v. *Commissioner*, 14 T. C. 1229, and *McBride* v. *Commissioner*, 23 T. C. 901, held that the Commissioner is not bound by the determinations of his agents for prior years. The taxpayer answers that these cases are not in point; we contend that they are very much in point. And also see, *Caldwell* v. *Commissioner*, 202 F. 2d 112 (C. A. 2d); *Mt. Vernon Trust Co.* v. *Commissioner*,

75 F. 2d 938 (C. A. 2d); *Savage* v. *Commissioner*, 31 B. T. A. 633, reversed on other grounds, 82 F. 2d 92 (C. A. 3d); *Estate of Shore* v. *Commissioner*, decided March 28, 1956 (1956 P-H T.C. Memorandum Decisions, par. 56,075). The cases have noted that a failure by the Commissioner to challenge an incorrect claim made by the taxpayer may well indicate nothing more than oversight, error, or lack of information rather than acquiescence as to the taxpayer's claim.

II

The Tax Court Was In Full Accord With the Statutory Requirement of Section 7459(b) of the 1954 Internal Revenue Code When In the Instant Case It Rendered a Memorandum Opinion Containing Within the Opinion Itself the Facts Presented By the Case Rather Than Setting Them Out As a Separate Category of the Report

As an additional error, the taxpayer contends that the Tax Court erred in failing to make separate findings of fact in its memorandum opinion. (Br. 6, 24-25.) The pertinent statutory requirement concerning this matter is presented in Section 7459(b) of the 1954 Internal Revenue Code, *supra*, which reads as follows:

> *Inclusion of Findings of Fact or Opinions in Report.*—It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions, and memorandum opinions.

The contention that the Tax Court had failed to follow the aforementioned statutory authority which the taxpayer contends requires specific findings of fact is certainly not a novel argument. This is a contention that has often been litigated and further has clearly been answered in opposition to taxpayer's position. For instance, in *Emerald Oil Co.* v. *Commissioner*, 72 F. 2d 681 (C. A. 10th) the Tenth Circuit upon reviewing the facts there presented held (p. 683):

> The Board in its memorandum opinion set out the facts upon which its decision was based, but did not make separate findings of fact. This is assigned as error. Under section 907 (b) of the Revenue Act of 1924, as added by Revenue Act 1926, § 1000 (26 USCA § 1219 note), the Board was required to make findings of fact. *Kendrick Coal & Dock Co.* v. *Commissioner* (C. C. A. 8) 29 F.(2d) 559.
>
> But section 601 of the Revenue Act of 1928 (45 Stat. 871, 872 [26 USCA § 1219]) reads in part as follows:
>
> "Sections 906 and 907 (a) and (b) of the Revenue Act of 1924, as amended, are further amended to read as follows: * * *
>
> " 'Sec. 907 * * * (b) It shall be the duty of the Board and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Board shall report in writing all its findings of fact, opinions and memorandum opinions.' " [4]

[4] The sole change between the statute then in effect and the present is that the word "Board" has been changed to "Tax Court". Section 7459 of the 1954 Code.

> By the use of the disjunctive "or," Congress manifested the intention to leave it optional with the Board to make its report in the form of special findings, an opinion, or a memorandum opinion. See House Reports, Vol. 1, No. 2, p. 30, 70th Congress, First Session. Under section 907(b) as amended a written opinion may perform the function of a finding of fact, and we may look to it to determine what the decision is and the facts upon which it is based. *Olson* v. *Commissioner* (C. C. A. 7) 67 F.(2d) 726; *Insurance & Title Guarantee Co.* v. *Commissioner* (C. C. A. 2) 36 F.(2d) 842; *Commissioner* v. *Crescent Leather Co.* (C. C. A. 1) 40 F.(2d) 833, 834; *California Iron Yards Co.* v. *Commissioner* (C. C. A. 9) 47 F.(2d) 514, 518; *Sheppard & Myers, Inc.*, v. *Commissioner* (C. C. A. 3) 45 F.(2d) 50, 51.

Subsequent to the decision in the *Emerald Oil* case, this Court also held that an appellate court may look to a Tax Court opinion for the facts presented by the case. *California Barrel Co.* v. *Commissioner*, 81 F. 2d 190, 193.

CONCLUSION

For the aforementioned reasons, the opinion of the Tax Court is correct in all respects and should be affirmed.

Respectfully submitted,

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